Changing the Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners' Privileges in the Face of Vested Expectations?

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Do persons investing in common interest communities have a legally enforceable expectation that aspects of the community in existence when they invest will not change without their consent? Should they have this expectation? This article addresses these questions by exploring a number of common areas of dispute changed situations in common interest communities. The initial purpose of the inquiry is to determine whether courts recognize any protection against change.\(^1\) Where decisions providing protection appear, the inquiry turns to whether these protections relate to the nature of the change itself, to the method in which the change was implemented, or to some broader theory of judicial review the governance systems of common interest communities.\(^2\)

Not surprisingly, this inquiry, did not produce consistent results. With regard to virtually every change chosen for study, research revealed cases in which courts had recognized and protected a vested expectation.\(^3\) With possibly one

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1. See infra Part I.
2. See infra Part II.
exception, however, the majority of cases in each area pro-
vide incomplete protection from change. In most areas the
common interest governance was afforded considerable
power to implement change.\(^4\) In some cases, the breakdown
into separate classes of change yielded surprising results.
Based upon a very small sample, courts have been more in-
clined, for instance, to recognize a vested interest in allowing
pets, than they have been in allowing children.\(^5\) Other re-
results were less surprising. Courts appeared far more likely
to reject changes that involved potential special privileges for
individuals than they were to reject changes applicable to the
entire population of unit owners. This was true regardless of
whether some of those owners were adversely affected.\(^6\)

Similarly, results were somewhat inconsistent regarding
whether the context of the decision matters. Some jurisdis-
tions were far more permissive when the change was imple-
mented by a vote of unit owners, rather than when it was by
an elected association board of directors or some equivalent
representative group.\(^7\) Most who recognized a protected ex-
pectation interest at all, however, seemed prepared to recog-
nize it, to some degree, despite voted changes.\(^8\)

Considerable discussion concerning theories of judicial
review of association decision making, is evident in case law
and commentaries. An analysis of these differing theories
yield, for the most part, no difference in the degree to which
each of theory would affect protection of vested expectations.
The method of protection, however, may be affected by the
applicable legal theory.\(^9\)

Whether, and to what extent, vested expectations ought
to be protected once identified depends, to a certain extent,
on the balance of community values and concerns of individ-
ual freedom. This article concludes that courts not generally
inclined to overturn association decision making should nev-
ernessle provide protection for perceived vested expecta-
tions, while still permitting common interest associations to
make their own decisions and to establish cooperative and

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4. See, e.g., id.
5. See infra Part I.A.
7. See Couch v. Southern Methodist Univ., 10 S.W.2d 973 (Tex. Comm'n
App. 1928). See generally infra Part I.
8. See infra Part I.
9. See infra Part IV.
uniformly controlled communities. The device to accomplish this is neither new nor extraordinary; it simply takes legitimate vested expectation considerations into account in fashioning a remedy. In this way, courts can recognize the community's general right of self-determination, avoid economic windfalls to individual unit owners who wish to avoid the community's general policies, and fashion individual compromises to ease the burden of being out of step.

I. WHAT CONSTITUTES "CHANGING THE DEAL?"

Defining the scope of inquiry for this research required an exercise of judgment as to what types of association decision making might be viewed as a true alteration of the original expectations of the parties. There is room here, of course, for significant disagreement. What may be a cataclysmic development to one unit owner might be the normal working out of a preexisting scheme for another. Obviously, courts that hold that a given association rule is completely consistent with the overall theme of the community, to which all residents have subscribed, are unlikely to take seriously the objections of a unit owner whose vested expectations have been frustrated.

One case which confronted this issue directly was *Beachwood Villas Condominium v. Poor*. The association board, without unit owner approval, adopted a policy detailing significant limitations on the rights of unit owners to rent their apartments. The court did not indicate whether any limitation existed prior to that time. The declaration did not address whether unit owners were prohibited from renting their units. It stated only that "[t]he Board of Directors may, from time to time, adopt or amend previously adopted rules and regulations governing and restricting the use and maintenance of condominium units . . . ." The court considered a challenge to the board's leasing restrictions based specifically on the argument that the board lacked the authority to adopt such rules under the very general language of the

10. See infra Part IV.
12. Id. at 143-44.
13. Id.
14. Id. at 1144.
“use and maintenance” rubric contained in the declaration.\(^{15}\)

The court rejected the position of an earlier Florida court which held that “use restrictions, to be valid, must be clearly inferable [sic] from the Declaration.”\(^{16}\) Instead, the Beechwood court concluded that any use regulation that does not expressly contravene an express provision of the declaration or a right reasonably inferable therefrom, was within the discretion of the board.\(^{17}\) The court explained that a declaration is unlikely to provide clear direction concerning the myriad of use issues that a board is likely to consider: “[p]arking regulations, limitations on the use of the swimming pool, tennis court and card room - the list is endless and subject to constant modification.”\(^{18}\)

The logical result of the court’s analysis would be that virtually any use restriction would not be viewed as a “change in the deal.” Further, if the declaration could be read to authorize other discretionary judgments by the association board, those judgments also would not be viewed as changes regardless of their content. This view of the common interest ownership agreement goes too far.

Of course, the court was accurate in pointing out that the complexities of common interest ownership, particularly condominium ownership, are such that it would be impossible to address each of the myriad of issues that necessarily come within the jurisdiction of the association board.\(^{19}\) The conclusion that courts, therefore, should abdicate the responsibility of identifying areas of regulation that go beyond the expectation of unit owners, however, is neither necessary nor appropriate.\(^{20}\) The court allowed for the fact that some determinations might implicitly contravene the declaration. Its

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15. Id. at 1145. In Beachwood, it is unclear who the parties challenging the rules were. It can be assumed, however, they were unit owners who argued they had a vested expectation that the leasing policies would not be altered.


17. Beachwood, 448 So. 2d at 1145. Note that the court preserves the issue as to whether the court could review the board’s exercise of discretion to "reasonableness." The court indicated that the reasonableness of the restrictions themselves was not at issue; only whether the board had authority to enact them. Id. at 1144.

18. Id. at 1145.

19. Id.

20. Id.
holding—that substantially limiting rental of units is within board discretion—suggests that there are few aspects of private ownership of a common interest unit that are not subject to change.

Although it is true that no exact test can be formulated, there are clearly expectations that unit owners have when they invest. For instance, the law generally places a high value on freedom of alienation of real property, and normally construes broadly any legal instrument broadly in favor of protecting such alienability. Thus, the ability to rent one’s unit in a common interest association ought to be viewed as one of the most fundamental of buyers’ expectations. The right to house one’s family is another fundamental expectation. The fact that the drafters of the declaration did not set forth a “unit owner’s bill of rights” listing all the expectations to which unit owners were entitled, may be a reflection of the drafters’ assumption that such expectations need not be stated, rather than a statement that all issues are open to the change.

The numerous cases cited below demonstrate that many unit owners expect protection from subsequent action by common interest associations. Although courts have not always agreed, the principle of protected property interests inherent in unit ownership is well established.

Selected for research in this article are several different areas that commonly fall into dispute: (1) age restrictions, (2) leasing restrictions, (3) pet restrictions, and (4) building restriction. These areas do not exhaust the field, but are adequate to permit an examination of how courts balance unit owner’s expectations against community controls.

Although the issues addressed in this article are similar to the fundamental question posed in the Beachwood Villas litigation, the context here is broader. The Beachwood Villas case assumed that there were certain areas of regulation that could not be changed by action of the association board, but the court implied that these areas, nevertheless, could be changed by vote of the unit owners. The inquiries in this

22. RICHARD R. POWELL, 10 POWELL ON REAL PROPERTY § 840 (1998) [hereinafter 10 POWELL ON REAL PROPERTY].
23. Id. at 1145. One should leave open the possibility that a “super major-
article are whether there are, and whether there should be, protected expectations of unit owners that even a majority vote to amend the bylaws or declaration could not change.

II. RESTRICTIONS ON USE

A. Age Restrictions

Restrictions on children residing in common interest communities raise obvious and significant policy issues. What concern of a homeowner could be more fundamental than the right to have a family in the home? When one acquires a home without restrictions against occupancy by children, shouldn't it be to assumed that this could be a family home?

The common law answer to the latter question is clouded by the fact that federal fair housing laws now significantly restrict the power of an association to discriminate against families with children.\(^2\)\(^4\) Associations now attempting to enforce age restrictions involving children will find themselves unsuccessful\(^2\)\(^5\) and potentially liable for significant damage claims.\(^2\)\(^6\) Consequently, it is difficult to gauge the current view of the courts as to the power of an association to change rules on occupancy by children.

Court decisions in the 1970s and 1980s, prior to the adoption of the federal prohibitions, indicate that the courts


\(^{25}\) See Simovits v. Chanticleer Condominium Ass'n, 933 F. Supp. 1394 (N.D. Ill. 1996). Simovits is particularly instructive because the plaintiff unit owner bought with full knowledge of the restriction in question, based upon a prepurchase meeting with an association committee that explained the rules directly. The plaintiff had even run for the association board on a platform suggesting that "I like Chanticleer as an adult community and would like to keep it that way." Id. at 1397. See also Martin v. Palm Beach Atlantic Ass'n 696 So. 2d 919 (Fla. Dist. Ct. App. 1997) (finding a prima facie violation of the Act when the Association failed to amend its rules to remove a prohibition against children and distributed copies of these rules, even though it did not enforce them).

\(^{26}\) Chanticleer awarded an injunction, actual damages, and punitive damages to individual homeowners and a housing advocacy group, plus litigation costs. 933 F. Supp. at 1408. Other tort damages, such as emotional distress damages, are also available. See Martin, 696 So. 2d at 923.
were disposed to permit associations to change the rules in this area, despite expectations of existing unit owners. Restrictions against children reflect the values of a certain class of purchasers in common interest communities—retirees and "empty nesters." These restrictions existed quite commonly in housing developments in the 1970s and 1980s, particularly in areas favored by retirees and "empty nesters." In a number of cases, courts upheld such restrictions against objections that they restrained alienation of the property, violated religious freedoms, or were so repugnant to social values as to be unenforceable as a matter of public policy.

Only a few court decisions involved rules that were changed to restrict the age of residents after an affected owner purchased a unit. In each of them, the courts upheld the change. For instance, in *Everglades Plaza Condominium Ass'n v. Buckner*, the association amended its declaration to restrict occupancy by children following the plaintiff's acquisition of his unit, but prior to his remarriage and acqui-
sition of a ten year old stepson. 34 The stepfather argued that the association could not alter his rights in this area following the acquisition of his unit. 35 The trial court found the provisions ambiguous, and refused to enforce them against plaintiff’s stepson. 36 The appeals court reversed, finding that the amendment unambiguous and, therefore, valid. 37 The court cited language in the declaration similar to that found in a Florida statute permitting amendment to declarations by less than 100% of the unit owners. 38 It is important to note, however, that the court pointed out that the situation before it, was “altogether different from the parent who has a child already permanently living with him at the time of an amendment barring children.” 39 The court did not say why such situation would be different.

Another Florida case, decided a year after Everglades but in a different appellate district, may stand for the proposition that restrictions on children cannot be enacted retroactively. The decision gives such little attention to the issue, however, that it is difficult to make out its significance. In Constellation Condominium Ass’n v. Harrington, 40 the court upheld a rule prohibiting permanent occupancy by children against a couple who acquired their unit with knowledge of the restriction later had a child. 41 The court refused to permit the association to enforce an amendment to the association rules that limited the number of days during which a child under the age of twelve could reside on the premises. 42 The court characterized this as a “retroactive regulation,” but did not otherwise discuss the issue. Apparently, the basic

34. Id. at 836.
36. Id. at 837. A tactic common to most of these cases was to argue that the terms of the provision were too ambiguous to be enforced. Of course, such an approach is often palatable to a trial court as it restricts the impact of the decision, and involves no broad policy implications. As indicated, however, the cases involving age restrictions tend to reject such ploys, at least at the appeals court level. Id. Accord Constellation Condominiums Ass’n v. Harrington, 467 So. 2d 378, 381-82 (Fla. Dist. Ct. App. 1985).
37. Everglades Plaza, 462 So. 2d at 837.
38. Id.
39. Id.
41. Id. at 383.
42. Id.
prohibition against children was the crux of the dispute. It may be that the Constellation court did not have before it the Everglades decision when it made its ruling. It is unclear what the court meant in characterizing the regulation as a "retroactive regulation." It seems likely that the court would have been concerned if the plaintiffs had a child residing with them at the time that the regulation was enacted.

In Ritchey v. Villa Nueva Condominium Ass'n, an association amended its bylaws, pursuant to a "super-majority vote" requirement, to restrict occupancy by children. Plaintiff owned a unit in the complex at the time. The complex was a Housing and Urban Development ("HUD") financed housing project subject to a HUD Regulatory Agreement. The bulk of the opinion dealt with the validity of the bylaw change under applicable federal regulations. The court found that a change in the permitted use of units, respecting occupancy by children, was a reasonable and valid action by the association.

An intriguing part of the Ritchey decision is the final section dealing with the plaintiff's allegations that the association exceeded the scope of its authority in enacting an age restriction on occupancy. Plaintiffs alleged that such

43. Id.
44. Id. (citing Winston Towers v. Saverio, 360 So. 2d 470 (Fla. Dist. Ct. App. 1978)). In Winston, the court refused to enforce a restriction on pets or replacements of pets that had not been registered in 1973. 360 So. 2d at 470. The association had adopted the restriction in 1974, so, in a sense, it was ex post facto legislation for pets acquired between the 1973 cut-off date and the 1974 rule. Id. Since the complainant's pet did not fall within that class, so it is difficult to know exactly what the court found as the fatal flaw in the restriction. Id.
46. 146 Cal. Rptr. 695 (Ct. App. 1978).
47. Id. at 697.
48. Id.
49. Id.
50. Id. at 700. The court indicated that the applicable federal regulation purports to convert the prohibition on transfer to families with children into a "right of first refusal." Id. at 700. In Ritchey, the plaintiff was not attempting to sell his unit or bring his own children into the unit, but to lease to a family with children. The court did not indicate whether the association had a right to lease the property from the plaintiff at the proposed rental rate in order to enforce the restriction against children. Id. at 698.
restriction was ultra vires.\textsuperscript{51} He argued that the association was established for the sole purpose of operating and maintaining the common areas and facilities of the project, and had no power to prescribe the usage of individually owned units.\textsuperscript{52} In a sweeping statement, court disagreed: “The authority of a condominium association necessarily includes the power to issue reasonable regulations governing an owner’s use of his unit in order to prevent activities which might prove annoying to the general residents.”\textsuperscript{53}

The court did not provide sufficient text from the declaration or other organic documents to indicate any specific grant of power to regulate tenant usage. The broad statement by the court however, also found in cases involving other types of use regulations, clearly indicated an early trend to approve broad changes in unit owner’s privileges of use, even on matters so fundamental as the housing of one’s own children.

In sum, the cases involving restrictions against children favored broad association powers of amendment during the time that such restrictions were permitted as a matter of federal law. A possible explanation for such outcomes is the fact that the conflicts tended to arise in associations in which the overall purpose of the condominium design was to facilitate retirement communities that catered to elderly residents, often a population that has difficulty coexisting with children. Further, this line of cases ended at a relatively early point in the evolution of thought regarding amendments to common interest community rules. As such, these cases may not provide sufficient perspective on the current thinking of the courts.

On the other hand, the use of one’s home to raise children is a fundamental concern. The willingness of courts, even in the heyday of condominium autonomy, to permit restrictions on such usage, is some evidence that courts are unwilling to set aside amendments to use restrictions even where they result in a deprivation of important property expectations. But there remains a suggestion that there is a

\footnotesize{\textsuperscript{51} Id. at 701. “Ultra vires” means “[a]n act performed without any authority to act on the subject.” BLACK'S LAW DICTIONARY 1522 (6th ed. 1990).}

\footnotesize{\textsuperscript{52} Ritchey v. Villa Nueva Condominium Ass'n, 146 Cal. Rptr. 695, 701 (Ct. App. 1978).}

\footnotesize{\textsuperscript{53} Id. at 701.}
limit on association authority in this area

B. Leasing Restrictions

The ability to lease a residential property when an owner does not wish to reside there is obviously a significant economic benefit. In the case of properties located in recreational areas an owner might have purchased the unit specifically with leasing in mind. It is not uncommon, however, for permanent residents of the community to develop interests antithetical to those of the leased unit owners. Because the permanent owners are more likely to participate in association politics, conflicts of various sorts arise between these two ownership groups on such matters as use restrictions and willingness to commit to higher assessments for maintenance or improvement of association amenities. Such conflicts can lead to permanent residents voting to prohibit the leasing of units. Where there is experience with unruly short-term tenants, resident owners may object to short-term vacation rentals while they will tolerate long-term leasing.54

Either type of restriction may severely impair the investment expectations of unit owners who wish to rent out their units. In the case of long term rentals, the sole objective of the unit owner in purchasing the unit might have been to invest in a rental property. Vacation rentals, on the other hand, provide the leasing owners with the ability to use their property when they wish and cover the costs (or even make a profit) by renting in the “high season.” Should these owners have anticipated that fellow association members might prohibit leasing activities simply because there is a general power to amend bylaws or to adopt rules concerning “usage?”

There is a stronger argument that leasing restrictions constitute restraints on alienation than there is for other forms of use restrictions. In the condominium setting, how-

54. See generally Yogman v. Parrott, 937 P.2d 1019 (Or. 1997). In Yogman, the Oregon Supreme Court held that short term rentals were not a violation of a covenant providing that that “all lots . . . shall be used exclusively for residential purposes and no commercial enterprise shall be constructed or committed on the property.” Id. at 1022. An interesting feature of this case was the court’s determination to return to the traditional rule that restrictive covenants should be construed narrowly, in favor of broad use privileges. Id. at 1023. The court rejected a pure “contract theory” approach that had been previously approved in Oregon in Swaggerty v. Peterson, 572 P.2d 1309 (Or. 1977), and, until recently, had been viewed as the “developing consensus.” Id. at 1023.
ever, courts frequently have found such restrictions justified, and as therefore permitted relatively broad exercise of power. Generally speaking, such courts have analyzed the "reasonableness" of the restrictions, measured in terms of the breadth and methods of enforcement, court have found no violation of the policy against restraints on alienation. Again, however, some decisions suggest the recognition of vested expectations that discard protection from change.

Perhaps, it was the concern with traditional values of alienability of land drove the North Dakota Supreme Court to issue one of the most sweeping opinions recognizing the vested rights unit owners have against changes in use controls in common ownership associations. In *Breene*, the court struck down a commonly adopted amendment to the bylaws of a condominium prohibiting leasing of units. The policy included a hardship clause and other special devices to "soften" its impact. The objections of the court did not address alienability or the fairness of the restriction. Rather the focus of its conclusion was that the right to lease the unit was part of the basic "bundle of rights" that unit owners expected to acquire with the purchase of their units. These expectations were established by the recorded statement of restrictions in existence at the time of purchase. The court stated that there could be no change that would affect these expectations. The association argued that the declaration in existence at the time the units were sold included provisions for its amendment by a vote of three quarters of the owners. The court responded that such general notice of possible change was not enough: "[K]nowledge of the provisions for amendment does not, without more, constitute the degree of knowledge necessary to establish a voluntary and inten-

56. See, e.g. Seagate, 330 So. 2d at 486-487.
58. Id. at 734-35.
59. Id. at 732. Leases of four months or less were permitted if the owner occupied the unit for the rest of the year. Existing lease arrangements were "grandfathered" for their existing term (but could not be renewed or extended). Unit owners with existing month-to-month arrangements had three months to end them. Id. at 732.
60. Id. at 734.
61. Id.
tional relinquishment of the statutory right to notice of a restriction prior to the purchase of a condominium unit.\footnote{63}

Despite the ringing words indicating that there was an absolute right to use the condominium as described in the declaration at time of purchase, the court backed away from this absolutist position toward the end of its opinion.\footnote{64} It stated that bylaw amendments may be made where the matters covered dealt with items specifically listed in the North Dakota statute as appropriate for bylaws.\footnote{65} These included: "maintenance of common elements, limited elements where applicable, assessment of expenses, payment of losses, division of profits, disposition of hazard insurance proceeds and similar matters."\footnote{66} As the statute did not declare use regulations to be an appropriate subject for bylaws, the court concluded that restrictions on use appearing in the bylaws should be dealt with as "restrictions" within the meaning of the North Dakota statute.\footnote{67} In its view, "restrictions" could not be changed by amendment.\footnote{68} The fact that the restriction in question appeared in the bylaws of this particular association made no difference.\footnote{69} It was the nature of the restriction, not its placement, that determined whether it could be amended.\footnote{70}

Although it may be argued that the Breene decision is driven by the special language of the North Dakota statute,\footnote{71} it represents a philosophical view as to whether condominium unit purchasers have a vested right in their purchase.

\footnote{63. Id.}
\footnote{64. Id.}
\footnote{65. Id.}
\footnote{66. Id.}
\footnote{67. Id. at 734-35.}
\footnote{68. Breene v. Plaza Tower Ass'n, 310 N.W.2d 730, 735 (N.D. 1981).}
\footnote{69. Id.}
\footnote{70. Id.}
\footnote{71. Id. Indeed, the Breene opinion distinguishes three earlier decisions on the grounds that the statutes in the affected jurisdictions are distinct. Id. at 734 (distinguishing Le Febvre v. Osterndorf, 275 N.W.2d 154 (Wis. App. 1979); Seagate Condominium Ass'n, Inc. v Duffy, 330 So. 2d 484 (Fla. Dist. Ct. App. 1976); Ritchey v. Villa Nueva Condominium Ass'n, 146 Cal. Rptr. 695 (Ct. App. 1978)). In Florida, for instance, the Seagate court pointed out the statute read that "an amendment of a declaration shall become effective when recorded according to law." Breene, 310 N.W.2d at 734 (citing Seagate Condominium Ass'n, Inc. v Duffy, 330 So. 2d 484 (Fla. Dist. Ct. App. 1976)). As a result, Seagate Condominium Ass'n, a Florida case authorizing an amendment to restrict leasing, was considered irrelevant by the Breene court. Breene, 310 N.W.2d at 734.}
This appears to be the construction of the case by the Minnesota court of appeals in Breezy Point Holiday Harbor Lodge-Beachside Apartment Owners' Ass'n, which construed Breene as holding that owners had vested rights that could not be compromised notwithstanding that the operative declarations provided for amendment. The Minnesota court, in dicta, rejected this viewpoint, citing cases in Florida and California. It should be noted, however, that the operative statutes in those states, as well as the Minnesota statute, were specific in providing for amendments to a condominium declaration.

Seagate Condominium Ass'n v. Duffy, precedent relied upon by the Breezy Point court, provided a specific rationale for leasing restrictions; it balanced that rationale against the possible impairment of alienability that such a restriction might impose. Seagate, however, specifically addressed only condominium uses. This case identified condominium regimes as having a special character that justified distinguishing them from other forms of restricted subdivisions. The court stated that:

Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside of condominium units . . . . Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South Florida in particular, [the Association's] avowed objective - to inhibit transiency and to impart a certain degree of continuity of residence and a residential character to their community - is, we believe, a reasonable one, achieved in a not unreasonable manner by means of the restrictive provision in question.

72. 531 N.W.2d 917 (Minn. Ct. App. 1995).
73. Id. at 919-20.
77. Id. at 486.
78. Id.
79. Id. See also Beachwood Villas Condominium v. Poor, 448 So. 2d 1143 (Fla. Dist. Ct. App. 1984) (maintaining that regulation of leasing rights is so patently within intendment of a condominium development that no specific
The Seagate court emphasized that the restrictions in question had a hardship exemption and could be changed by amendment to the bylaws when necessary.80 Aside from its description of the condominium community as a "democratic sub society," however, the Seagate court did not discuss the special issues arising when leasing restrictions are imposed after a unit owner has invested with the expectation of the right to lease.81

A subsequent Ohio case Worthinglen Condominium Owners Ass'n v. Brown,82 took a cue from Seagate and adopted the principle that condominium owners had the right to some expectation of reasonableness in the manner in which the association could alter the rules following an owner's investment:83

We do not . . . endorse the view that a person who voluntarily enters the ranks of condominium ownership surrenders all individual property rights. Individual property receives some protection in the condominium arrangement, although less than that accorded non-condominium property . . . . We agree with Seagate and cases from Ohio and other jurisdictions which generally require that condominium rules meet a "reasonableness test." Accordingly, we adopt the reasonableness test, pursuant to which the validity of condominium rules is measured by whether the rule is reasonable under the surrounding circumstances. If the rule is unreasonable, arbitrary or capricious in those circumstances, it is invalid.84

The Worthinglen court emphasized that in evaluating the reasonableness of a condominium rule, it is to consider whether it has been imposed by a majority in such a way as to improperly discriminate against a minority.85 Where an amendment is involved, the court should take into account the potential hardship imposed upon parties who invested in reliance upon the existing rules. Worthinglen rejected the "vested rights" approach protecting pre-existing unit owners

language in declaration is necessary to justify an association board in enacting such regulations as part of standard "use regulations"). See supra notes 2-8 and accompanying text.
80. Seagate, 330 So. 2d at 486.
81. Id.
83. Id. at 1277.
84. Id. (citations omitted).
85. Id. at 1278.
espoused in Breene, but remanded the case for a fuller consideration of the justification for the imposition of the leasing restriction at issue.66

A subsequent Florida case, Flagler Federal Savings & Loan Ass'n v. Crestview Towers Condominium Ass'n of Miami, implicitly rejected the reasoning of Seagate and Worthinglen.68 Flagler upheld the imposition of a leasing restriction against a lender who took a deed in lieu of foreclosure on a condominium unit following an amendment to the association’s bylaws. The amendment removed the existing provision permitting foreclosing lenders an exemption from the general “no leasing” policy.69 The specific nature of the provision and its amendment brings the court’s rejection of the condominium unit owners’ “investment expectations” that rules will not be changed into sharp focus.90 Flagler is absolute in its view as to the power of an association to change the rules on renting units, even in the case where there was clearly significant and specific reliance upon the existing rule.

One of the most recent cases in this area suggests a “bifurcated” approach to evaluating association amendments. Apple II Condominium Ass’n v. Worth Bank & Trust Co.,91 proposed that changes in association policies emanating from discretionary judgments of boards of directors or other association subgroups vested with discretion be evaluated on the basis of their overall reasonableness. Factual amendments to declarations or bylaws carried out by membership vote, however, would be measured only on the grounds of “strict rationality.”92 The Illinois appeals court specifically rejected the reasoning of the Ohio appeals court in Worthinglen; courts should protect unit owners from “tyranny of the majority” by evaluating voted changes on the grounds of the reasonableness of retroactive application.93 Under the Apple II

86. Id. at 1279.
88. Id.
89. Id. at 200.
90. Id. See McElveen-Hunter v. Fountain Manor Ass’n, 386 S.E.2d 435 (N.C. Ct. App. 1989) (discussing a similar “categorical” statement of an association’s right to change the rules on leasing).
92. Id. at 98.
93. Id.
test, when the amendment has been passed by membership vote in accordance with established association procedures, the court will presume that the restriction is valid, and uphold it unless it can be shown that the restriction is arbitrary, against public policy, or violates some fundamental constitutional right of the unit owners.94

In summary, the cases involving changes in the rules concerning leasing constitute a spectrum of four different groups: (1) recognition of a vested right in the unit owner; (2) evaluation of any change in terms of the reasonableness of its application against the expectations of existing owners; (3) "bifurcation" between changes implemented by representative boards and changes approved by voted amendment to the bylaws or declaration; and (4) vested right in association to change the rules at will.

Many of the above cases arise in the condominium context, and stress the special nature of the condominium relationship and special statutes dealing with condominiums. It would not be difficult, however, to make similar arguments justifying association power in dealing with the many non-condominium forms of common interest ownership that have evolved in recent years. These cases simply have not yet reached the appellate courts. When they do, it is likely that the courts will apply an identical analysis.

Although the cases involving leasing do not focus specifically on the significance of the leasing power as one that goes to the heart of an investment decision, they treat the question of amendment in this area as simply one of many changes associations may implement. Jurisdictions that charge courts with the duty of evaluating the reasonableness of a change on a case by case basis, however, have created a method by which unit owners can argue the special significance of their expectation of a continued right to rent.

C. Pet Restrictions

In a fascinating and important series of decisions, California courts have recently examined the validity of pet restrictions and, by extension, the degree to which courts should apply their own view of the reasonableness of owners’ association rules when called upon to interpret or enforce

94. Id. at 99.
those rules. In *Nahrstedt v. Lakeside Village Condominium Ass'n*, a California appeals court ruled that a unit owner who acquired her unit when the declaration contained clear language prohibiting cats, could nevertheless keep her three cats. The court evaluated the "reasonableness" of the restriction; it concluded that the restriction was unreasonable where it could not be shown that the cats imposed any burden on the community through noise, odor, or otherwise.

The California Supreme Court ultimately reversed, ruling that courts ought not to "second guess" the reasonableness of association rule making. The Court stated that courts should refuse to enforce such rules only when the objector has proven that the rules are arbitrary, substantially more burdensome than beneficial to the affected properties, or violative of a fundamental public policy. In reaching this conclusion, the court also overruled California cases questioning other types of association rules: restrictions on the use of satellite dishes and restrictions on trucks parking in association parking areas.

The reported decision in *Nahrstedt*, including a strong dissent by Justice Arabian, was an important milestone in jurisprudence in this area. Although the California decision does nothing more than interpret the meaning of a California statute requiring that servitudes must be enforced unless they are "unreasonable," the case was followed by community association authorities nationwide. The decision is likely to render common law jurisprudence to a posture more hospitable to the enforcement of recorded restrictions affecting common interest communities.

It is also important, however, to note what *Nahrstedt* did not do. The case did not rule on the proper standard for rule making and other decisions by elected boards in associations.

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95. 878 P.2d 1275 (Cal. 1994).
96. *Id.* at 1279.
97. *Id.*
98. *Id.* at 1275.
100. Portola Hills Community Ass'n v. James, 5 Cal. Rptr. 2d 580 (Ct. App. 1992).
101. *Id.* at 1292. (Arabian, J., dissenting).
The restriction on pets in the *Nahrstedt* case appeared in the original recorded covenants, conditions and restrictions, dating from the origin of the development.¹⁰⁴ The court stressed the fact that the pet restriction was part of the original arrangement, to which all landowners had committed.¹⁰⁶ It was neither a policy adopted by a representative group, nor a late change in the documents in contravention of established expectations. Throughout the opinion, the court referred to "recorded use restrictions" and emphasized that these restrictions formed a kind of social covenant to which all residents committed: "[t]o allow one person to escape obligations under a written instrument upsets the expectations of all the other parties governed by the instrument (here, the owners of the other 529 units) that the instrument would be uniformly and predictably enforced."¹⁰⁶

The *Nahrstedt* court cited with approval *Hidden Harbor Estates v. Basso*,¹⁰⁷ which drew a distinction between rules adopted by representative boards through delegated authority and rules set forth in the master deed or declaration.¹⁰⁸ In *Hidden Harbor*, a Florida court of appeals indicated that the rules adopted by association boards ought to be subjected to a "reasonableness" scrutiny by the courts. The court reasoned that these rules may or may not carry out the fundamental expectations of unit owners upon investment.¹⁰⁹ The original declaration, however, as viewed by the *Hidden Harbor* court should not be evaluated under a "reasonableness standard."¹¹⁰ Rather, the court stated that such use restrictions are "clothed with a very strong presumption of validity" and should be upheld even if they exhibit some degree of unreasonableness.¹¹¹

*Nahrstedt*, then, did not reach the ultimate issue of whether parties who acquire interests in a common interest community that permits pets have a vested interest that the

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¹⁰⁵. *Id.* at 1292.
¹⁰⁶. *Id.* at 1288.
¹⁰⁸. *Id.* at 640.
¹⁰⁹. *Id.*
¹¹⁰. *Id.* at 639-40.
community will continue to permit them. The majority of the small number of cases that have considered the issue have upheld such a change, although the procedural contexts in which these cases have arisen leaves some question as to whether the courts squarely confronted the issue of whether an owner had a vested right in being able to retain his or her pet.\textsuperscript{112}

In \textit{Noble v. Murphy},\textsuperscript{113} the association, by a vote of the unit owners, amended its bylaws to prohibit new pets; however, prior to the vote the association had rules and regulations with equivalent provisions.\textsuperscript{114} The court emphasized that the affected unit owner had no quarrel with the change, as it had prior notice that pet restrictions existed.\textsuperscript{115}

In \textit{Cornerstone Condominium Ass'n v. O'Brien},\textsuperscript{116} a North Carolina court of appeals upheld the validity of a board-adopted rule prohibiting dogs against a unit owner who owned his unit prior to the adoption of the prohibition but did not acquire a dog until afterwards.\textsuperscript{117} The sole ground on appeal was the procedural validity of the rule. The issue of whether the unit owner had any “vested rights” was not considered.\textsuperscript{118} Other cases similarly have failed to address the issue.\textsuperscript{119}

Perhaps the clearest decision on point is \textit{Dulaney Towers Maintenance Corp. v. O'Brey}.\textsuperscript{120} The association board adopted rules restricting dogs after the defendant unit owners had acquired their unit.\textsuperscript{121} The rules contained an exemption for existing dogs, but the defendants subsequently ac-

\textsuperscript{112} Id.
\textsuperscript{114} Id. at 268. Pets owned prior to a unit owner's arrival at the premises could be retained. Id.
\textsuperscript{115} Id. at 271.
\textsuperscript{116} 435 S.E.2d 818 (N.C. Ct. App. 1993).
\textsuperscript{117} Id. at 819.
\textsuperscript{118} Id.
\textsuperscript{119} Meadow Bridge Condominium Ass'n v. Bosca, 466 N.W.2d 303 (Mich. Ct. App. 1991) (only question before court was whether restriction, of which unit owner had prior notice, constituted a rule that could be adopted by board, or a bylaw that required unit owner approval); (Shawnee Carlton House Condominium Ass'n v. Worrilow, No. 1-86-35, 1989 WL 17285, at *1 (Ohio Ct. App. 1989) (unreported opinion) (finding that unit owner not bound to accept arbitration ruling and could challenge validity of pet restriction adopted after he purchased a unit; the case was remanded for such challenge).
\textsuperscript{120} 418 A.2d 1233 (Md. 1980).
\textsuperscript{121} Id. at 1235.
quired another dog. In an enforcement action against the unit owners, a Maryland court of appeals upheld the prohibition against a challenge that the board lacked authority to regulate the use of units themselves, as opposed to common area activities. The court also evaluated and upheld the reasonableness of the prohibition. Although the court did not specifically address whether the defendants had a vested right due to the pre-existing ownership of their unit, the facts were squarely before the court and almost certainly taken into account.

A Florida decision, *Winston Towers 200 Ass'n, Inv. v. Saverio*, found, with little analysis, that an amendment prohibiting animals was invalid as against a unit owner who acquired his unit prior to the amendment, even where the owner acquired the pet after the amendment, upholds a trial court ruling that the bylaw was "void and unenforceable inasmuch as it was an attempt to impose a retroactive regulation." The association had previously permitted residents to own dogs registered with the association prior to 1973, the association adopted its new restriction in 1974. In a sense, it was *ex post facto* legislation for pets acquired between the 1973 cut-off date and the 1974 rule. The complainant's pet did not fall within that class, so it is difficult to know exactly what the court considered as the fatal flaw in the restriction. The case was otherwise devoid of reasoning and appeared to depart substantially from other Florida case law of the same period upholding use regulations of various kinds

122. *Id.*
123. *Id.* at 1237. Defendants argued that regulation concerning the use of privately owned units was appropriate only for unit owner voted changes in bylaws or declaration. The court acknowledged that authority construing Massachusetts statutes analogous to the prior Maryland law might have supported such a conclusion, but that the revised Maryland statutes clearly authorized delegation to the association board of the power to regulate the use of units as well as common areas. *Id.* at 1237-38.
124. *Id.* at 1235.
126. *Id.* at 470-71.
127. *Id.*
128. *Id.*
129. *Id.*
including, ironically, prohibitions on children. 131

The pet prohibition cases involve the quintessential area of use regulation that should be considered within the discretion of the association, 132 at least as to acquisition of pets following implementation of a prohibition. Community living necessarily involves certain compromise. Where the community interest is against the keeping of pets, there is arguably no critical interest affected by adopting a prohibition against acquisition of pets. Judge Arabian, however, felt differently. 133 Courts evaluating the issue have treated it as a serious matter; but even more serious matters would appear to be the more profound questions of whether children may live in a unit, or the economically more serious issue of whether a unit can be rented.

The few cases considering the pet issue, appear to treat differently the question of whether the amendment ought to apply to unit owners who already have pets. This may raise a more fundamental question as to whether amendments ought to be scrutinized for their uniform application, as discussed below.

D. Building Restrictions

Among the most common restrictions binding residential subdivisions are those prohibiting construction building on affected lots. For example, some associations allow single family homes only. Such provisions have appeared in subdivision declarations. Judicial decisions for over sixty years, predating the explosion of common interest ownership developments, also reflect these restrictions. The principles by which courts evaluate changes in such provisions, however, are relevant to an analysis of the rights of common interest development unit owners. Indeed, in common interest communities where the units consist of undeveloped lots, these

131. Everglades Plaza Condominium Ass'n v. Buckner, 462 So. 2d 835 (Fla. Dist. Ct. App. 1984). The case, similar to Winston Towers, involves a unit owner who had no children at the time of the amendment, but who later acquired a stepchild whom he wanted to reside in his unit. Id.

132. See supra Part II.D. There is no need to elevate the question of ownership rights. It is no more than a use regulation to be handled at the level of board discretion. See also Meadow Bridge Condominium Ass'n v. Bosca, 466 N.W.2d 303 (Mich. Ct. App. 1991).

same restrictions are likely to appear. Further, many common interest communities have architectural control provisions limiting changes to the exterior characteristics of individual units.

A number of cases address the question of whether there are limits on the ability of unit owners, pursuant to express modification provisions in their declarations, to alter building restrictions within their developments.\textsuperscript{134} As a general matter, where the provisions are clear, the courts have little problem upholding such modifications.\textsuperscript{135} A number of decisions, however, have inserted an important judicial limitation on the functioning of these provisions: unit owners cannot alter restrictions affecting a single lot or a small number of lots.\textsuperscript{136} The rationale is that the original declaration envisioned a scheme that provided for mutual burdens and benefits established by the building restrictions.\textsuperscript{137} Courts will permit a uniform alteration of the restrictions, so that all lots are affected equally by the newly revised burdens and benefits. It would be inconsistent with the scheme to permit only some lots to suffer greater burdens or benefit from lesser burdens without a reciprocal impact on the balance of lot owners.\textsuperscript{138} Such an alteration would be inconsistent with the original purpose of the scheme and is viewed as beyond the power of amendment, even where the provisions granting such powers are not so limited.\textsuperscript{139}

An example of this line of cases is \emph{Riley v. Boyle},\textsuperscript{140} where

\begin{footnotes}
\footnote{135. \textit{See infra} note 147.}
\footnote{136. The seminal case on the point appears to be Cowherd Dev. Co. v. Littick, 238 S.W.2d 346 (Mo. 1951). \textit{See also} Walton v. Jaskiewics, 563 A.2d 382 (Md. 1989); Camelback Del Este Homeowners Ass'n v. Warner, 749 P.2d 930 (Ariz. Ct. App. 1987) (relieving nine of 83 lots from single-family restriction); Zent v. Morrow, 476 S.W.2d 872 (Tex. Civ. App. 1972) (holding that any action taken by property owners to "alter, extend, or revoke" existing restrictions, must apply to all of the properties subject to them); Montoya v. Barrerras, 473 P.2d 363 (N.M. 1970) (relieving one lot from single-family restriction); B.C. Rickets, \textit{Validity, Construction, and Effect of Contractual Provision Regarding Future Revocation or Modification of Covenant Restricting Use of Real Property}, 4 ALR 3D 570, 582 (1986).}
\footnote{137. \textit{See supra} note 136.}
\footnote{138. \textit{See supra} note 136.}
\footnote{139. \textit{But see} Fairway Estates v. McNamee, CIV. No. 88 CA 27, 1988 WL 134664, at *1 (Ohio Ct. App. 1988) (unpublished opinion) (rejecting uniformity requirement in Ohio). Where subdivision restrictions permit amendment by stipulated vote, amendment can affect only one lot. \textit{Id.}}
\footnote{140. 434 P.2d 525 (Ariz. Ct. App. 1967).}
\end{footnotes}
the declaration provided that existing restrictions on development of subdivision lots could be amended by a vote of 51% of the lot owners.\textsuperscript{141} The court held that this language necessarily meant that this percentage of lot owners could amend the restrictions as to all the lots, but not merely as to some of the lots.\textsuperscript{142} To permit otherwise would destroy the basic scheme of uniform restrictions:\textsuperscript{143}

Taking these words to mean that particular lots could be excepted permits the obviously unintended result that 51 per cent of the owners could exempt their own property and leave the other 49 per cent unencumbered or could even impose more strict restrictions upon certain lots. Certainly such an interpretation could easily result in a patchwork quilt of different restrictions according to the views of various groups of 51 per cent and completely upset the orderly plan of the subdivision.\textsuperscript{144}

In some cases, changes agreed to by all lot owners led to changed circumstances within the subdivision and it no longer made sense to attempt to enforce the restrictions.\textsuperscript{145} Even in these circumstances, however, courts have been reluctant to authorize further change if it is possible that the original scheme can be preserved.\textsuperscript{146} Where the original scheme did not call for uniform restrictions, partial alterations in the scheme have been permitted.\textsuperscript{147}

\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Cf. Lakeshore Estates Recreational Area, Inc. v. Turner, 481 S.W.2d 572 (Mo. Ct. App. 1972). "The release of that right which they have acquired in the other lots, termed in the old cases, their status as 'dominant tenants' as to the other lots, may not be altered without their consent or its alteration in such a way as to be uniform as to all of the affected property." Id. at 575.
\textsuperscript{147} See Vogli & Co. v. Lane, 405 S.W.2d 885 (Mo. 1966). The Missouri Supreme court upheld the removal of significant building restrictions on six lots, all owned by one interest. The subdivision restrictions provided that homeowners, by seventy-five percent vote, could "release any one or more" of the restrictions. Id. at 890. The court ruled that this language ought not to be limited only to apply to only releases as to all lots. Id. Note that the respondent objecting homeowners in this case filed no brief, but the court did cite and distinguish Cowherd Development Co. v. Littick, 238 S.W.2d 346 (Mo. 1951), on the grounds that in the instant case the restrictions were already non uniform, and that the six lots were specially burdened, suggesting that special provisions
 Vested Expectations

It appears, however, that the real thrust of these opinions is to interpret the express protections provided by the declarations, not to specify any fundamental interest as sacrosanct even from express declaration language permitting change. Other cases have permitted piecemeal change where the declaration was express. Only one case was found, however, that gave a "liberal" reading of an amending provision. The court then read the provision to permit alterations as to only some lots when the provision could have been read more narrowly. For the most part, the trend appears to integrate these provisions narrowly in order to protect individual expectations of a uniform scheme from alterations effectuated by less than a unanimous group of homeowners.

It must be noted, however, that the expectation protected in this line of cases is not that the development within the subdivision will remain the way it was when a property owner first invested. The courts are quite willing to authorize massive changes if such change is authorized in the declaration, even if approved by only a bare majority. Thus, the development could change dramatically. The only protection provided by the courts is that the change be uniform. The focus of this protection appears to be directed more at relieving a lot owner from burdens when there is no correlative benefit, rather than protecting a homeowner: expectation of continued enforcement of existing restrictions.

III. Changes in Use of Common Elements

Condominium regimes create co-tenancy interests in all unit owners in "common elements," portions of the development property not owned separately by individual own-
ers. 11 Commonly, the declaration by which the condominium regime is established vests the owners’ association with certain powers related to these common elements. 12

The inquiry is whether individual unit owners have the right to argue that their expectations, based upon conditions existing when they acquired ownership are protected from subsequent action by governing boards. One could envision a system in which all control over the common elements is vested in the association board as trustee for the co-tenant owners. This is more or less what happens in other forms of common interest ownership environments. For example, in residential subdivisions, the association board is given broad management control over amenities such as recreational facilities, clubhouses, and even private streets and ways.

The common elements in a condominium development, however, often bear a more fundamental relationship to a unit owner’s property expectation. The elements may, in fact, include all of the physical superstructure that envelop the unit owner’s property: the walls, floors, roof, elevators, lobbies, parking areas and the ground beneath the structure. The unit owner in a multi-level condominium structure usually separately owns only an area of space defined by the internal dimensions measured inward from the building studs. 13 Consequently, the unit owner has a strong interest in the integrity of certain of the common elements. This interest is reflected in both case and statutory law.

Most of the court decisions in this area involve detailed interpretations of condominium statutes and provisions of declarations. Arguably, the courts are doing nothing more

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11. In most cases, this feature differentiates condominiums from other forms of common interest ownership. In planned unit communities and similar subdivisions, for example, property that is not owned by individual unit owners will likely be owned by a separate entity—an incorporated or unincorporated association, which in turn has members that usually consist of the individual property owners in the development. Where the association owns the elements intended for common use and benefit, the association, through its organic charter and bylaws, can make decisions concerning the use of these elements. This section addresses the special problems that arise in condominium settings where the common elements actually are owned in common by individual condominium unit owners but managed by an association.


13. WAYNE S. HYATT, CONDOMINIUMS & HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 7.06(a)1, at 380-81 (2d ed. 1988) [hereinafter HYATT, COMMUNITY ASSOCIATION LAW].
than interpreting clear language expressing legislative or contractual intent. When comparing the decisions involving common elements to other cases in which courts review the power of associations to alter pre-existing conditions, however, one finds a decided trend toward providing greater protection of unit purchasers' expectations. This is especially true with regard to common elements, both as to rights of use and protection from change.\textsuperscript{154}

A. Association Approval of Physical Intrusions into Common Elements by Unit Owners

Generally, condominium regimes create two types of common elements: general common elements (or, simply, common elements) and limited common elements.\textsuperscript{155} Limited common elements are owned in common, but use of these elements is provided to an individual unit owner.\textsuperscript{156} Limited common elements include: balconies, patios, parking areas, window frames and other parts of the individual unit that protrude beyond the boundaries of the unit.\textsuperscript{157} The purpose of allocating the ownership to the community is to insure that the community has the right and responsibility to maintain these elements for the good of the community, even though a single unit owner retains day-to-day use. General common elements include: most of the structure housing the units, the land, general use parking areas, and recreational facilities.\textsuperscript{158}

Most condominium statutes provide that both types of common elements are owned in common by the unit owners, in proportions established by statute or by the declaration. The ownership or the percentages of ownership cannot be changed without some meaningful form of consent; frequently 100\%—of all unit owners.\textsuperscript{159} The statutes also fre-

\textsuperscript{154} This discussion does not include cases involving attempts by declarants, original condominium developer, to add to, or obtain special use of, the common elements after commencing the development of the condominium. The balance between the interests of developer and unit owners involves special political and consumer law issues that are not relevant to the inquiry in this article.

\textsuperscript{155} HYATT, COMMUNITY ASSOCIATION LAW, supra note 153, § 7.06(a)(2)-(4), at 381-83.

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} See generally Grey v. Coastal States Holding Co., 578 A.2d 1080 (Conn. App. 1990) (protecting unit owners' rights in common elements from invasion
quently contain contradictory language, vesting in the vote of the board of directors or some other process, control over the management of the common areas, including language that permits their sale or disposition.\textsuperscript{160}

A few cases have relied upon the breadth of the management rights of the board of directors to provide general authority to restrict the ownership of common elements. In \textit{Ochs v. L'Enfant Trust},\textsuperscript{161} for example, the D.C. Court of Appeals found that a condominium board of directors had authority to transfer a “conservation easement” to a private historical preservation group. The court allowed the transfer even though the easement would permanently affect the value of the building and the individual units in it in addition to potentially requiring significant maintenance costs for the association in the future.\textsuperscript{162} The court relied upon language in the D.C. condominium laws that permitted the board of directors to “grant easements through the common elements.” The court concluded that other language in the statute and declaration that protected the interests of the unit owners in the common elements was necessarily subordinate to, or consistent with, this language.\textsuperscript{163}

The \textit{Ochs} case contains several technical flaws. Any real property specialist would note the obvious flaw in the court’s interpretation of the “conservation easement” involved in this case, not as an easement, but rather an elaborate set of covenants limiting the rights of the owners, instead of extending use rights to third parties. The statutory language authorizing the granting of easements “through” the common ele-
ments appears to refer to use rights that involve physically traversing the space occupied by the common elements, rather than an elaborate contractual undertaking.\textsuperscript{164} The court's willingness to use this general and inapplicable language to preempt the interests of the unit owners in the common elements, stands in stark contrast to approaches taken by other courts.\textsuperscript{165} This holding appears to represent a very clear "tilt" toward representative government as the primary determinant of condominium ownership interests in the District of Columbia.\textsuperscript{166}

\textit{Carney v. Donley}\textsuperscript{167} is an example of the more prevalent view recognizing special value in the unit owners' interests in common elements.\textsuperscript{168} A unit owner proposed to extend the balconies outside his units into space above a sundeck used by other unit owners.\textsuperscript{169} The space into which the balconies would protrude constituted common elements.\textsuperscript{170} Further, the balconies required physical supports that would be located on the sundecks themselves, also common elements.\textsuperscript{171} The condominium board of directors approved the project pursuant to a provision which stated that "no alterations of any common elements or any additions or improvements thereto shall be made by any unit owner without the prior written approval of the Board."\textsuperscript{172} Another provision of the declaration stated expressly that if a unit owner wished to "use or occupy any portion of the common elements for any reasonable use appurtenant to said unit,"\textsuperscript{173} it could do so if there was no unreasonable interference with the common elements, and another section stated that the Board was the final arbiter of "any dispute or disagreement between any unit owners relating the property, or any question of interpretation or application of the provisions of the Declaration or by-laws."\textsuperscript{174}

Despite this rather extensive statement of board discre-
tion, the court emphasized the protected interest of the unit owners in the integrity of the common elements. It relied on language in the declaration that stated "[t]he extent or amount of [ownership of common elements] shall be expressed by a percentage amount and, once determined, shall remain constant, and may not be changed without unanimous approval of all owners."\(^\text{175}\) Despite the broad management rights expressly given to the board, and notwithstanding the somewhat uncertain application of the declaration language involving ownership of common elements to a situation involving mere usage of common element space, the court held that the declaration protected the unit owners from the board's authorization of the balcony extension.\(^\text{176}\)

The Carney reading of the declaration language was as much of a "stretch" of the plain meaning of that document as was the District of Columbia court of appeal's reading of the "easement" authorization in L'Enfant Trust. While both courts were reaching for a policy goal, each was reaching for a very different one. The District of Columbia decision was designed to vest control over the condominium in the elected governors.\(^\text{177}\) The Illinois decision stated that individual unit owners have special protection in the physical space constituting the common elements.\(^\text{178}\)

In Posey v. Leavitt,\(^\text{179}\) the court similarly protected the integrity of unit owners' expectations in the common elements against discretionary actions by the association board.\(^\text{180}\) As in Carney, the declaration in Posey provided that no owner could intrude into the common element area without first obtaining written consent of the board.\(^\text{181}\) The court found that

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175. Id.
176. Id. at 1022. Compare Newport Condominium Ass'n, Inc. v. Concord Wisconsin, Inc., 556 N.W.2d 775 (Wis. Ct. App. 1996) (upholding reallocation of common element verandah to limited common element status when done by three-fourths vote of association members, most of whom benefited from the decision, could pointed out that dissenting owner still had statutory protection if the change diminished the value of his individual unit).
180. Id.
181. Id. at 574.
the board of a condominium association had approved the extension of a dock into common element area. Nevertheless, the court concluded that the general language of the declaration provided that the percentage ownership of the common elements could not be altered; the court sought protected the unit owners against diminution of their rights in the common elements. These rights included rights of access and use that extending the dock would compromise. Such alteration could not occur without unanimous owner approval.

B. Allocation of Common Element Parking Rights to Individual Unit Owners

The special concern that courts give to the integrity of common element interests generally also appear in a number of cases involving allocation of parking rights on common element property. It is well established, and not surprising, that association boards have general authority to regulate parking. Such regulation, so long as it does not alter the relative rights of the various unit owners, does not interfere with, the basic property rights of the owners, even though it may in fact, frustrate their investment expectations. Presumably, the validity of such decisions would be measured in the same way as other use restrictions, such as those involving leasing of units and keeping of pets.

Numerous cases, however, have concluded that an attempt by the association to reallocate parking rights in common element parking areas, allowing some unit owners different rights than others, constitutes an alteration in the

182. Id. at 578. Under California's somewhat unusual condominium statutes, it was permissible for the association actually to own the common areas, subject to easements in the owners, as was the case here. The mutual easements of use owned by the unit owners collectively constituted common elements that formed the basis of the unit owner's rights.
183. Id. at 578.
184. Id.
187. See supra Part I.B.
188. See supra Part II.C.
relative ownership rights of common elements. Such a change must satisfy the rigorous approval requirements set forth in the statute of declaration for ownership changes. The only departure from this rule is found in Lyman v. Boonin, which involved an historical Philadelphia building that had been converted into a condominium. It had limited parking capacity. The condominium association voted to change the parking policies to allocate available parking on a priority basis allowing resident unit owners priority over non-resident owners. Plaintiff non-resident owners attempted to overturn the decision, arguing that it constituted a reallocation of percentage ownership in common elements without appropriate approval. The association defended on the grounds that the association board had clear authority to regulate parking under the declaration and could legally allocate parking priority to resident owners. The court upheld the association's priority system, but carefully distinguished contrary authority on the grounds that the limited parking facilities involved in this case made it impossible to provide equal access to all unit owners. The court acknowledged "equal interest in common elements" principle, however, by requiring that the association charge those with parking privileges a fee equivalent to the true cost of maintaining the parking facilities. Thus, unit owners without parking access would not have to subsidize "parkers" through maintenance assessments paid to the common fund.

Alpert v. Le'Lisa Condominium Ass'n also upheld a reallocation of parking rights to the most tenured residents from units that had previously had parking rights allocated

191. Id. at 767.
192. Id. The rules revision also prohibited the subletting of parking spaces, attempting to insure that the priority parking system really served its purpose of accommodating resident owners ahead of others with respect to the limited space available in the structure. Id.
193. Id. at 767.
194. Id.
196. Id.
to them.\textsuperscript{198} There were adequate spaces for all units in this case, but only some of the spaces were indoors.\textsuperscript{199} Plaintiff, who had acquired a unit with an allocated parking space prior to the declaration amendment, objected on the ground that the amendment altered common element rights and therefore required unanimous approval.\textsuperscript{200} Absent such approval, plaintiff argued, there could be no reallocation, even though the amendment had been approved by 93.7\% of the owners.\textsuperscript{201} The court analogized parking allocation to use restrictions such as those discussed earlier.\textsuperscript{202} The court concluded that where only temporary parking rights were allocated to unit owners, did not transfer upon resale, and thus there was no interference with the ownership of common elements.\textsuperscript{203} The Le'Lisa decision, however, has recently been overruled\textsuperscript{204} in a case involving access rights.

C. Access and Road Usage Rights

Common elements generally are the means by which owners obtain access to their units. Although, some control over the usage of these ways is necessary to maintain order, and the association boards are the appropriate governors of these ways, courts have recognized, a fundamental right of access that association boards do not have authority to abrogate. The right of access is such a fundamental concern of a property owner that the common law has long recognized special rules providing for access upon the subdivision of real estate. Lot owners may obtain implied easements of necessity even when there is no existing road. When there is an existing road, lot owners may obtain easements of implication across those roads. When roads are laid on subdivision plats, most courts recognize some right to use these roads, al-

\textsuperscript{198} Id.
\textsuperscript{199} Id. at 949.
\textsuperscript{200} Id. at 951.
\textsuperscript{201} Id. at 950.
\textsuperscript{202} See supra Parts I, II.
\textsuperscript{204} Sea Watch Stores L.L.C. v. Council of Unit Owners of Sea Watch Condominium, 691 A.2d 750 (Md. Ct. Spec. App. 1997). The court overruled Le'Lisa on the basis of Ridgely Condominium Ass'n v. Smyrniodis, 681 A.2d 494 (Md. 1996), which held that allocation of exclusive use rights in common element property to an individual unit owner, is an invalid diminution in the rights of other unit owners. Id.
though there is some disagreement as to whether this right inheres to all the roads or only to those reasonably necessary for access to the owner's parcel.\textsuperscript{205}

The traditional emphasis on the importance of access is likely to find its way into the jurisprudence of common ownership associations. Access to condominiums, usually requires access across common elements. The alteration of access rights generally is regarded as an alteration of common element ownership usually requiring special, if not, unanimous, ownership approval.

A decision by the Massachusetts Supreme Court, Kaplan v. Boudreaux,\textsuperscript{206} illustrates the extensive protections afforded to common element ownership.\textsuperscript{207} A walkway within a complex provided access to only a single unit.\textsuperscript{208} The owners of that unit sought permission to landscape the area as well as an amendment providing that they had exclusive use of the area.\textsuperscript{209} Although over seventy percent of the owners consented to the change (more than enough for most purposes of amendment), one unit owner challenged the action as a contravention of a provision of the declaration which stated that there could be no change in the percentage of common element ownership without unanimous consent.\textsuperscript{210} The court held that allowing the proposed change would breach that provision of the declaration, even though the rights conferred by the change would merely constitute an exclusive license, not an ownership right, the area was of no practical benefit to anyone but those who sought the special rights.\textsuperscript{211}

Another recent and important case in this area is the Maryland Court of Appeals decision in Ridgely Condominium Ass'n v. Smyrniodis,\textsuperscript{212} where an association of mixed com-

\begin{thebibliography}{10}
\item 205. 10 Powell on Real Property, supra note 22, § 34.08[2].
\item 206. 573 N.E.2d 495 (Mass. 1991).
\item 207. Id.
\item 208. Id. at 496.
\item 209. Id. at 497.
\item 210. Id.
\item 211. Id. at 500. Cf. Grimes v. Moreland, 322 N.E.2d 699 (Ohio Misc. 1974) (holding that the placement of air conditioner compressors for individual units in common areas constitutes an impermissible ouster of other tenants from that area). Compare Parillo v. 1300 Lake Shore Drive Condominium, 431 N.E.2d 1221 (II. App. Ct. 1981) (permitting owner to enclose balcony that was a limited common element would not change percentage of ownership rights because use already was exclusive).
\item 212. 681 A.2d 494 (Md. 1996).
\end{thebibliography}
mercial/residential condominium adopted a rule restricting access through its lobby for commercial unit owners. The owners had ready street access through outside entrances, but objected that the loss of access through the newly refurbished lobby would diminish the value of their businesses. Lower courts reviewed the association decision on the grounds of its reasonableness, and had found it invalid. When the association appealed to Maryland’s highest court, however, the court set aside the issues as briefed and analyzed the case in terms of the diminution of the ownership interest of the commercial tenants. The declaration had given them an undivided interest in the common elements, including the lobby. The court, citing Kaplan, among other cases, concluded that a restriction of their use of the lobby diluted their ownership interest in the common elements. Such diminution of ownership could not be accomplished without unanimous consent of unit owners.

IV. GENERAL CONTROLS ON COMMON INTEREST RULES

In evaluating whether courts ought to take into account expectation interests of existing unit owners when addressing changed policies it is useful to inquire whether there are any general judicial restrictions on the operation of community policies, resulting from amendment or originally ap-

213. Id.
214. Id. at 497.
215. Id. at 498.
216. Id. at 499.
217. Id. at 500. The court distinguished a Maine decision that had approved an expansion of access to certain recreational common elements by an adjacent resort hotel. In this case, there was no restriction on the rights of the existing owners, nor alteration of their relative rights, but simply the granting of a non-exclusive use right to others. See Jarvis v. Stage Neck Owners Ass’n, 464 A.2d 952 (Me. 1983). Cf. Schaumburg State Bank v. Bank of Wheaton, 555 N.E.2d 48 (Ill. App. Ct. 1990) (grant of non exclusive easement rights in common element access area not a dilution of ownership).
218. The balance of this article discusses considerations that usually apply both to subdivisions that have no formal associations and to association-governed communities. The author refers to all types of common interest developments as “communities.” Further, the basic documentation of the interests of the owners might be set forth in the declaration, articles and bylaws of an association, statement of covenants, conditions and restrictions, cross easement agreement, subdivision plat, or some similar basic document, or some combination of documents. For purposes of this article, all the original documents containing the original community arrangement will be referred to as the “community charter.”
pearing in the community charter. A number of limitations on the discretion of communities to enforce their policies have been adopted by courts or proposed in the literature. This article considers several of them: the "reasonableness" test; the "business judgment" rule, and Constitutional standards.219

A. Reasonableness Test

A number of jurisdictions have found it useful to adopt a "reasonableness" standard; that common interest regulations should be enforced only when such enforcement would be "reasonable." This standard appears in the statutes of a few states.220 In some states, the statutes require that the provisions of a condominium declaration contain "reasonable" restrictions.221 At least one commentator has argued that such language might not limit the reach of rules as opposed to declaration terms.222 Florida statutes impose reasonableness limitations only on rules pertaining to the use of the common elements, common areas, and recreational facilities.223

Many other jurisdictions have adopted a common law requirement that community policies be "reasonable."224 One of the most commonly cited cases is Hidden Harbour Estates v. Norman,225 which upheld a condominium association rule limiting the use of alcoholic beverages in the clubhouse.226 The court indicated that "an association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to


221. MISS. CODE ANN. § 89-9-17 (1972 & Supp. 1997); R.I. GEN. LAWS § 34-36-10 (1995); UTAH CODE ANN § 57-8-10(1) (Michie 1994).


225. 309 So. 2d 180.

226. Id. at 182.
the health, happiness and enjoyment of life of the various unit owners. The court stated specifically that the test was one of "reasonableness," and that the rights of the association go beyond merely recapitulating the common law protection against nuisance. The justification for the broad reach of condominium rules, notwithstanding their negative impact on personal freedom and alienability of property, was that condominium residents are more interdependent than other property owners. As such, they need to be able to agree upon elaborate mutually binding rules:

[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

Courts generally treat the "reasonableness" test as an issue of law. Cases applying the test go to some length in evaluating the justifications for the particular rule.

In Hidden Harbor Estates v. Basso, a Florida court subsequently held that the "reasonableness standard" was appropriate for determinations made by elected boards, but that was not an appropriate measure of unit-owner voted changes to the declaration or bylaws. In the case of voted changes, the Hidden Harbor court concluded that courts ought to sustain such changes unless the changed violated public policy or abrogated a fundamental constitutional right.

A recent Florida decision, Holiday Pines Property Own-

227. Id.
228. Id.
229. Id. at 181.
230. Id. at 181-82.
233. Id. at 640.
234. Id.
ers Ass'n v. Wetherington, however, identified a separate limitation on the rights of unit owners to amend a subdivision plat. Holiday Pines, involved some property owners who opposed several amendments to restrictions originally set forth on a subdivision plat (the functional equivalent of a condominium declaration). The changes in question were proposed by the developer with regard to a number of separate subdivision areas. The recorded restrictions in some of these areas expressly permitted the developer to amend the restrictions over time. Those in other areas, however, required a two-thirds approval of lot owners. The restrictions that gave the court difficulty created one master association relating to all plats, made membership in the association mandatory, and conferred upon the association extensive budgeting and assessment rights. Finally, the right to amend the provisions relating to the association was permitted only by a majority of affected homeowners. The Holiday Pines court held that the consolidation of the subdivisions was valid since the original restrictive covenants had permitted the addition of new subdivisions. The court also upheld a set of amendments in 1983 that created a voluntary owner's association and an architectural review committee. The court struck down, however, the provisions of a 1987 amendment that made membership in the homes association mandatory. Interestingly, in striking down the 1987 changes as beyond reasonable contemplation of the original covenants, the court stated that the problem was that they effectively made the subdivision into a condominium. It indicated that non-condominium subdivisions did not involved the special interconnectedness of ownership that justified

236. Id. at 87.
237. Id.
238. Id. at 86.
239. Id. at 85.
240. Id. at 86. The court does not differentiate between the validity of the owner-voted changes and the developer-enacted changes. It apparently would apply the reasonableness test to both. 596 So. 2d 84, 87 (Fla. Dist. Ct. App. 1992).
242. Id. at 87.
243. Id.
244. Id.
245. Id.
surrender of individual freedom in condominium settings.\footnote{Id.}

In language that clearly subjects all forms of subdivision plat amendments to a rule of reason, the court stated:

In determining the enforceability of an amendment to restrictive covenants, the test is one or reasonableness. While traditionally a reservation of the right to amend restrictions would allow the grantor to change the entire character of a subdivision, the modern view is that a reserved power to modify restrictions must be exercised in a reasonable manner so as not to destroy the general plan of development.\footnote{Id.}

Prior Florida authority on this point had applied this reasonableness limitation to amendments to subdivision properties in dicta.\footnote{Holiday Pines Property Owners Ass'n v. Wetherington, 596 So. 2d 84, 87 (Fla. Dist. Ct. App. 1992).} The cases themselves involved changes carried out by the developer, rather than by vote of unit owners.\footnote{Nelle v. Loch Haven Homeowners Ass'n, 413 So. 2d 28 (Fla. 1982); Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowner's, Inc., 303 So. 2d 665 (Fla. Dist. Ct App. 1974); Johnson v. Three Bays Properties #2, Inc., 159 So. 2d 924 (Fla. Dist. Ct. App. 1964).} The new language goes further and states that even amendments voted on by other unit owners cannot alter the basic expectations created in the original scheme.\footnote{Id. at 974.} This is not to say that a court should feel comfortable rejecting a community charter amendment barring pets or prohibiting leasing. Such actions may be consistent with the original scheme, even if the root documents are broadly phrased. The use of the word “reasonable,” however, necessarily suggests an individual judgment based upon the individual circumstances of the community. No universal conclusions can be reached as to a particular change.

The Texas court of appeals decision in Couch v. Southern Methodist University\footnote{10 S.W.2d 973 (Tex. Comm'n App. 1928).} refused to uphold an amendment to a subdivision plat that removed building restrictions, including “residential only” limitations, on a group of properties.\footnote{Id. at 974.} The
properties apparently were held by various owners. The amendment had been approved by a vote of more than three quarters of the owners within the subdivision, as permitted by amendment provisions in the restrictions themselves. Nevertheless, the court held that the changes in question destroyed the character of the subdivision and could not be implemented without unanimous consent. The court did not use "reasonableness" as a limitation on association rights.

The decision in Worthinglen Condominium Owners' Ass'n v. Brown contains the most extensive discussion on the application of the reasonableness test to amendments to common interest ownership relationships. The court stated that, under Ohio law, the reasonableness test involved several discrete inquiries: (1) whether the decision or rule was arbitrary or capricious; (2) whether the decision or rule was discriminatory or even-handed; and (3) whether the decision or rule was made in good faith. These standards applied whether or not the issue was the impact of a rule on vested rights or expectations. The Worthinglen court added a fourth consideration when the change had an impact on pre-existing expectations that the retroactive impact of a rule must be considered in evaluating its reasonableness:

We agree that evaluation of any condominium rule under the reasonableness test requires an examination of the foregoing considerations, including the potential hardship.

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253. Id. at 973.
254. Id.
255. Id. at 974. Cf. Twin Lakes Village Property Ass'n v. Twin Lakes Investment. 857 P.2d 611 (Idaho 1993) (refusing to uphold amendments to a subdivision restrictions that altered voting rights of members, but upholding extensive alterations of amendments permitting association to acquire and operate a golf course). Note that in this case the original provisions stated that no amendments could be effectuated that would "deprive any member of rights and privileges then existing, or to amend the by-laws as to effect a fundamental change in the policies of the association." Compare Scoville v. Springpark Homeowner's Ass'n, 784 S.W.2d 498 (Tex. Ct. App. 1990) (discussing subdivision restrictions which allow homeowners to totally remove restrictions to all lots if passed by a seventy-five percent vote).
258. Id. at 1277.
259. Id.
260. Id. at 1278.
261. Id.
to access as a result of the amendment. Included therein, by necessity, is not only a consideration of whether the surrounding circumstances render a restriction on an owner's use of his or her property reasonable, but also a determination of whether the rule has been reasonably implemented...the issue is not only whether plaintiff reasonably may restrict defendant's right to lease her unit, but also whether plaintiff reasonably may do so retroactively.262

The court was not inclined to conclude that the defendant unit owner had an absolute right to retain the right to lease her unit. The unit owner contended that she had invested in reliance on the expectation.263 The court, however, remanded for a determination of the reasonableness of applying the no-renting policy to her case.264

B. The Business Judgment Test

A select number of cases and authorities have maintained that common interest association rules ought to be measured by rules analogous to those applied to a board of directors in a private corporation.265 In Papalexioou v. Tower West Condominiums,266 the court stated that the "reasonableness" rule, as applied in New Jersey, was the equivalent of the corporate business judgment rule.267 If the rule is enacted in good faith, it is valid.268 The "rule" in this case was an association board decision that emergency conditions existed to justify a special assessment.269 The bylaws gave authority to the board to elect to use such an assess-

262. Id.
264. Id. at 1279.
265. Rywalt v. Writer Corp., 526 P.2d 316 (Colo. Ct. App. 1974) is commonly cited for the proposition that the business judgment rule should be the sole determinant of the validity of the decisions of association boards. The court in that case, however, also evaluated whether the board had the authority to carry out its decision under the bylaws. Id. Such an inquiry has led other states to evaluate board determinations under the reasonableness test. The fact that the court saw no reason to question whether the board had authority to make its decision here does not necessarily lead to the conclusion that the only relevant question in measuring the validity of a board's judgment was that it had authority to make a decision in good faith. Id.
267. Id. at 285.
268. Id.
269. Id. at 284.
ment in response to emergency conditions. The board concluded that such an assessment was the best response to a massive deferred maintenance situation.\textsuperscript{270} Unit owners argued that under the bylaws the board lacked authority to impose the assessment. The fundamental question was whether an emergency actually existed.\textsuperscript{271} The court essentially held that where such a determination is made in good faith, the court will undertake a separate analysis to set aside the association judgment.\textsuperscript{272}

The "business judgment" rule might appear to be a major departure from the "reasonableness" test. The differences, however, are subtle; they are minor violations in the degree of deference paid to an association board's judgment. The business judgment rule presumes that the board has the authority to make the questioned determination. In reaching its conclusion on this point, a reviewing court, can make a determination about the association's basic nature and the expectations of its members. If the court concludes that the members had not given the board the right to make a particular determination the court will never reach the question of whether the board's resolution of the issue was protected as a "business judgment."

The reasonableness test, on the other hand, may authorize a court not only to evaluate the delegated authority of the board, but also to evaluate independently the correctness of the board's decision. In doing so, the court is likely to take into account the fact that the board is closer to the problem and will naturally give some deference to judgments made by the board. The presumption of validity, however, is slightly less than under the business judgment rule than under the "reasonableness test."

When evaluating whether courts ought to recognize unit owner expectations in enforcing changes in the policies of a

\textsuperscript{270} Id.
\textsuperscript{271} Id. at 286.
common ownership development, the differences between the business judgment test and the reasonableness test may be less than the ordinary differences. Both tests assume that the court will first reach a determination as to whether an association board has a right to make a rule in a particular area. Unit owners might have an expectation that certain conditions will not be changed, such as restrictions on leasing. In that case, the court may have to evaluate the legitimacy of the board's authority to address the issue before determining whether the board did so satisfactorily. Only after deciding that the board has the power to make the decision, will the court confront how much deference to afford that decision. Thus, under both tests a court must evaluate the question of vested expectations before it reaches the issues where the test dictates a difference in approach.

Furthermore, even after the preliminary determination, it is possible that, under either test, the court will take vested expectations into account. The reasonableness test, as formulated by the Worthinglen court, would permit the court greater latitude in evaluating the legitimacy of the board's application of its revised policy to an individual unit owner specially and adversely affected by the change. Even though a court using the "business judgment" test might not take into account the impact of the decision as part of its review of the decision itself, it may take such concerns into account in determining what form of relief ought to be granted.

Some courts would not apply the reasonableness test to changes instituted by unit owner vote. Similarly, the business judgment rule focuses exclusively on the conduct of the board members and does not purport to provide a basis for evaluating the question of voted changes.

In sum, the question of whether courts ought to recognize vested expectations of unit owners goes beyond the choice between the business judgment rule or reasonableness test. Regardless of the test used, the courts must still evaluate whether there are expectations that deserve special protection.

C. The Public Agency Model

The leading case of White Egret Condominium, Inc. v. Franklin and number of commentators have suggested that decision making in common interest associations ought to be regulated and reviewed by standards generally applicable to municipal corporations. Their arguments assert that procedural and substantive due process guarantees provided by the United States Constitution ought to apply to such associations. Such arguments relate primarily to the method of decision making, rather than to the ultimate decisions. Of course, a commonly recognized feature of public land use regulation is the protection afforded to the pre-existing non-conforming use—a vested expectation of continued ability to conduct a use instituted before a zoning change. Further, the public agency model would recognize the concept of protection against “takeings,” some protection against the majority imposing upon certain individuals the cost of a general benefit. Determining the level of protection to afford these types of interests under the public agency model is beyond the scope of this article. It is sufficient to point out that there is nothing in the public agency model that is inconsistent with the types of protections afforded to vested expectations in any of the cases discussed. Each doctrine, and each form of protection, could easily find a correlative in public agency law.

D. The “Freedom of Contract” Argument

A number of commentators have argued that there should be virtually no regulation of association decision making except to the extent that the court identifies language in declarations or other basic documents that permits the decision to be made. The argument is close to that un-

275. 379 So. 2d 346 (Fla. 1979) (appearing to apply Constitutional due process and equal protection standards to enforcement of a “no-children” rule).
276. See generally Katharine Rosenberry, Condominium and Homeowners Associations, Should They be Treated Like “Mini-Governments”? 8 ZONING & PLAN. L. REP. 153 (1985).
derlying the business judgment rule. One would assume that courts who follow it recognize some implicit provision that authorized decisions must be made in good faith.\textsuperscript{279}

Perhaps the most significant difference that likely would flow from a rigid application of the freedom of contract argument, as opposed to the business judgment test, is that courts would provide complete contractual enforcement to each and every determination made in accordance with the written standards of the association. The business judgment test focuses on the validity of the root decision, but does not necessarily remove enforcement determinations from the court’s discretion. An absolute freedom of contract approach, however, would deprive courts of enforcement discretion.

There is much to be said for the freedom of contract notion as applied to real property interests generally. Where it can be assumed that the original association agreement was the result of a true market decision by parties with the necessary knowledge and sophistication to make an informed choice, such an approach even in the area of common interest associations is preferable. Most common interest development law to date, however, has arisen in the context of residential communities. Most home purchasers \textit{should} learn about the restrictions applicable to their properties, and the ways in which those restrictions can change. The author, with considerable experience in counseling unit purchasers in restricted communities, can attest that most home purchasers \textit{do not} learn about these matters before they purchase. In many cases, a full understanding of all the implications of common interest ownership is beyond their intellectual or experiential grasp.

To advocate that courts cannot apply an approach to associations designed to provide support for a smoothly operating marketplace, is not to say that courts should have unlimited discretion rewrite all the rules. Where courts substitute their judgments of appropriateness for the judgments reflected in association decisions, they frustrate the legitimate expectations of unit owners who do make educated and thoughtful decisions. Where special hardships arise, however, an absolute enforcement approach will lead to consequences that may deter investment in common interest as-

\textsuperscript{279} Id.
associations. Moreover, such an inflexible approach is unlikely to fulfill the true expectations even of those who expect the courts to enforce generally the policies legitimately established within the association.

One way to recognize vested expectations, notwithstanding application of a freedom of contract test, would be to read the original documents narrowly in order to protect legitimate expectations and special concerns. Where the language is clear, no protection would be warranted. Such an approach is inconsistent with the notion that parties who enter into a contract have a duty to make their special needs and concerns patent; and ought not rely upon non-standard implied, readings. The documents should be read for their plain meaning, with no particular "tilt" for, or against, any group.

In sum, a true "freedom of contract" approach likely is inconsistent with the protection of vested expectations of the type discussed above. To that extent, it is an inadequate approach for addressing particular issues of enforcement of changed policies in common interest communities.

CONCLUSION: A PROPOSED APPROACH—FOCUS ON REMEDY

There is no basis to argue that purchasers of units within common interest communities have an expectation that there will be no changes at all. The relationships created in most common interest communities are too complex for them to continue unchanged for substantial periods of time. Most unit owners know or should know that. The presence of an association, with its boards, committees, policies, and rules also would demonstrate to any unit purchaser that a certain amount of discretion has been vested in elected leaders. Thus, sometimes decisions made through this process will not meet the preferences of each unit owner.

In the context of commercial developments, it is likely that a discussion about the existence of vested rights begin and end with the declaration or equivalent "community charter:" a subdivision map with restrictive covenants or other formative documents. If that document contains provisions for change through membership vote, or the creation of representative bodies to effectuate change, courts have no reason to intrude upon the contract rights and expectations created therein. Courts' sole function, in this circumstance, is
In exercising their interpretive function, a number of courts have taken the position that a fair interpretation of the various provisions for change appearing in common interest community charters is that such changes ought to be "reasonable." In the commercial context, this interpretive approach is unwarranted and dangerous. It is fair to assume that most decisions made by participants in a commercial venture, are made with a single economic motive.\footnote{Where business decisions are made with malicious intent, there are adequate special remedies, such as tortious interference remedies, to address such problems. Wholesale rereading of the language of every community charter is not necessary to protect against malicious, anti competitive or other socially undesirable decisions in commercial common interest communities.} All investors participate with the expectation that each of the other investors will make decisions in their own individual economic best interest.

There is no reason to believe that courts are better equipped to make such determinations than are the parties themselves. There is danger in allowing the courts to do so. When courts routinely substitute their views of "commercial reasonableness" for those of the parties to a long term real estate investment, society pays a price in terms of predictability of result. The consequence is that deals that may represent the best and most efficient reallocation of resources for the public interest will not get made—the costs of making the deal become too high. The decisions of commercial real estate investors depend upon limiting the number of variables affecting risk. Certainly the danger that a court may substitute its judgment for the business judgment of the affected parties is a significant expansion of risk. When parties cannot have predictability of result in their contract language, they must negotiate for substitute means of achieving predictability.\footnote{Real estate relationships are hardly unique in their reliance upon predictability of contract in order to reduce uncertainty. But many commercial relationships in which modern courts or lawmakers (such as the drafters of the Uniform Commercial Code) have elected to impose duties of good faith and fair dealing or other general "reasonableness" requirements do not arise as clearly from individually bargained transactions. "Marketplace morality" is an assumed part of such agreements, and many understandings are left unstated because of this. This environment is less true of real estate investments generally than it is of other types of commercial relationships—such as sales of goods.}

The argument can be made that many commercial real
estate investors, in common interest developments, do not bargain over, or even read, the terms of their community charters. Others do read and rely upon them. All investors know, or should know, that these documents will have an impact on their long term investment activities. An investor's choice not to read them constitutes a bargaining decision in and of itself. There is a short term savings in bargaining time and the cost of legal advice. The investor, however, ought to be expected to pay the price if at some future time, the documents will lead to an undesirable result. To protect the investor from this untoward future consequence is to punish inappropriately those who did read and rely upon the language in the community charter.

Although the same argument made above can and has been made with regard to residential communities, human experience suggests that it has little foundation in reality. For the majority of investment decisions regarding common interest communities, there is neither available information nor opportunity to bargain with terms of the community charter. Some states, including California, require the provision of extensive disclosure documents in connection with marketing of these interests. In many states, including California, home buyers are neither required nor encouraged to obtain legal counsel to advise them. Residential real estate is part of our "consumer economy." Most purchasers of goods and services trust government and blind luck to insure that they get what they want and are protected from what they do not.

There is some temptation to suggest that consumers who are careless and neglect to anticipate that their common interest communities will change in ways that they find undesirable, should have no more protection against such changes than the commercial investor. The justification in the commercial context, however, is that other investors have read and understood the community charter, and have invested in the expectation of its precise application. This is not so likely

282. See Susan F. French, The Constitution of a Private Residential Government Should Include a Bill of Rights, 27 WAKE FOREST L. REV 345 (1992) (arguing that unit owners in fact would respond to community charters that protect their legitimate expectations, and thus invest more readily in a community that has such protections).

283. HYATT, HOMEOWNER ASSOCIATIONS, supra note 28, § 9.05, at 296.
to be true in residential communities. The courts rendering many of the decisions discussed in this article are like as shepherds guiding sheep who do not understand their legal environment and, as citizens and investors, need and expect that governmental organs, including courts, will insure reasonable behavior.

Some courts go beyond the mere protection from change in residential common interests. They recognize that there is little reason to believe that investors really understand the rules, as they exist at time of investment, view their function as evaluating each and every provision of the community charter and rules to determine what is reasonable. Some scholars maintain that a better approach to the problem is to impose new conditions and requirements on the process by which rules are made and enforced, to protect against arbitrary and oppressive decisions, yet permit community decision making.

There is some validity to the view of those who would subject all common interest community decisions and policies to special judicial scrutiny. At bottom, it is a question of consumer protection. Due to the fact that there has been much legislative attention given to the issue, however, it is unclear that courts should go beyond the policy decisions made by legislatures. Although many common interest investors do not base their investment decisions upon the absolute enforceability of the terms of their community charters, some do. Further, even in the residential area, a legitimate concern exists as to whether substituting of the judgment of courts for those reached by community processes actually will result in improvement sufficient to justify the dispute resolution cost. Judges make bad decisions too!

The survey undertaken for this article has identified a number of situations in which courts have identified a special interest in protecting unit owners in common interest com-

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284. See supra Part III.A.
285. See supra Part III.B.
286. One is hard pressed to understand how the several courts in the Nahrstedt decision could conclude that members of a community had no legitimate basis for prohibiting cats. Although some cats, properly supervised and maintained, may have no negative impact in a community, there is no assurance that all cats that are permitted once the prohibition is voided will receive such proper care or that the association would be able to enforce such levels of care once cats are permitted.
munities against unforeseen change. The protections have rarely been absolute. Nevertheless, the courts have recognized a legitimate interest in protecting common interest usage from reallocation, including: pet restrictions, leasing restriction, and other changes that have a significant impact on expectations of individual investors. This recognition is evident even where such changes reflect appropriate community judgments as to what the community should adopt as uniform rules.

Many courts have upheld reallocating in the name of uniform community behavior. Nevertheless, there is room for compromise. The compromise could occur in an area of law which has traditionally been within the discretion of the courts, even where express contract rights are recognized—the question of enforcement. If courts were to take expectations into account in reviewing the remedies available for breach of common interest provisions, they would be less concerned with whether the provisions breached, were themselves, reasonable. Courts could leave the ultimate determination of community policy to community decision makers, yet carve out exceptions for enforcement based upon special circumstances. Included would be the degree to which justifiable individual expectations have been frustrated by the change in question.

In determining whether an individual unit owner should enjoy relief from a changed policy, courts should take a number of factors into account. In light of the many of the factors that courts now use in evaluating the reasonableness or validity of the rule in general, a few suggestions are set forth below:

1. Does the change have a significant impact on the individual's use and enjoyment of the individual common interest investment?
2. Does the affected individual have reasonable opportunities to mitigate that impact?
3. Does evidence exists that the individual had reason to believe that the conditions existing at the time of investment could change?
4. Does the change affects the community generally, or

287. See supra Part III.
only a few individuals?

5. Would injury to the community environment result from recognizing a vested expectation in this individual?

6. Would injury to the autonomy of the community and its processes result from recognizing the vested expectation?

A distinction between voted and board-adopted changes is not suggested. Rather, the focus should be on the impact of the change on the individual and the benefit to the community. Courts should exercise great restraint in reviewing the validity of decisions made in a proper fashion pursuant to delegated authority. Even where the community has voted (less than unanimous vote) to alter the rules, the questions of impact on the individual and justification for the community remain the same. The outcome should not differ simply because the change was instituted by vote of unit owners.

Nor is a distinction between changes involving use rights in common areas and other issues suggested in this article. If the community adopts a policy affecting use of common areas, it does not necessarily affect ownership. Statutory prohibitions on the alteration of interests in common elements need not be read to prohibit the community absolutely from electing to allocate common elements to particular uses, even individualized uses. Where parking spaces are reallocated, or access rights are restricted, there is a significant impact on investment expectation. Thus, there ought to be a high level of justification where, for instance, a unit owner is given private use of a common element area that provides exclusive access to that unit and has no benefit to any other owner, there is no reason to uphold blindly some vested property interest in unit owners objecting to the change; there is no alteration in actual ownership and the private use could be discontinued by the same process if community needs or perceptions were to evolve in the future.

Protection of a vested expectation need not result in the wholesale destruction of a community policy, or even a long-term reduction in uniform treatment. An individual, for instance, could be permitted to keep a pet the individual maintained at the time the pet restriction was adopted, or even to replace that pet. The individual, however, might not be permitted to acquire additional pets. Even if an individual were
generally permitted to keep pets, the individual may not be permitted to sell the unit unencumbered by the pet restriction. The investor would be hard pressed to argue that there is an expectation in the resale value of the unit as a “pet friendly” unit in a “pet hostile” community.

In some cases the community needs will require that a validly authorized change be absolutely enforced, even if there is significant injury to individual expectations. For example, this might occur where common element parking spaces are allocated to individual unit owners. Such a change, under the decided cases, would be beyond the power of most common ownership communities. The rationale that it is a change in ownership percentage in common elements; a rationale not espoused here. Such a change, where adopted according to an unbiased and properly authorized process, should be viewed merely as a use rule. As such, the rule could always be changed again by the same process, and creates no ownership rights. The rule is simply the community's determination as to how to make the best use of the common elements within its control.288

Where the legal action is one for injunction or declaratory relief, traditional equitable functions, courts have always exercised broad equitable discretion in forming remedies. Those remedies may in fact recognize and avoid special hardships that could result from rigid enforcement of legal rights.289 In addressing only remedies, courts would exercise the traditional function, without engaging in rewriting community policies to prohibit practices expressly permitted in

288. The author would not make the same judgment about changes in common elements that would exclude an owner from beneficial use of a lobby for its commercial units, as occurred in Ridgely Condominium Ass'n v. Smyrniodis, 681 A.2d 494 (Md. 1996). Here, the author would conclude that general powers to control usage of common elements should not be read to avoid valuable access rights. The difference between the two situations, however, might easily be addressed on a case by case basis at the remedy level. There is no reason to adopt a general policy that communities cannot identify certain common elements as available only to certain classes of owners. It might be permissible, for instance, for a community to decide that tennis courts are to be used only by owners when they occupy their units, and not when they have rented them to others. See Liebler v. Point Loma Tennis Club, 47 Cal. Rptr. 2d 783 (Ct. App. 1995) (holding that a rule restricting use of tennis courts was valid where declaration provided that association could adopt “reasonable rules” to govern use of common areas).

vested expectations. Special problems will arise, of course, where the community charter provides its own mechanism for enforcement of rules against violators. In Nahrstedt, for instance, the dispute arose after the community association had assessed and attempted to collect penalty assessments for violation of association policies. Nevertheless, authorizing judicial discretion at the level of enforcement, even where the result may be non-enforcement of certain discrete association policies, is far preferable to upsetting community decisions completely.

There is no doubt that the special problems of common interest communities require the sacrifice of individual autonomy to the collective will. Where regulation of the use of residential property is concerned, however, there are many ownership interests which courts traditionally have valued. They ought not be lost by mistake or inadvertence. In residential real estate, especially common interest communities, there is a profound difference between technical legal rights and consumer expectations. Our society has encouraged and preserved a sense of security in consumer investors. The courts have bolstered that security by blunting the impact of legal rules inconsistent with consumer expectations. Where the needs of the community can still be met, the courts can play a useful function in fashioning remedies that recognize legitimately enacted community policies—even when they depart from consumer expectations. In so doing, court can preserve expectations to a reasonable extent. Crafting such remedies is essentially the exercise of traditional equitable discretion. The needs of the common interest community invite the application of judicial wisdom at this stage of community-owner disputes, without regard to whether courts have a broader role to play in reviewing association policy making generally.

290. Id. 291. Nahrstedt v. Lakeside Village Condominium Ass'n, 878 P.2d 1275 (Cal. 1994). 292. 10 POWELL ON REAL PROPERTY, supra note 22, ¶ 632.5. 293. Id. 294. See id.